FREE COPY

FILED
SEP 22 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 38

October Term 1965

Alfred D. Rosenblatt,
Petitioner

vs.

Frank P. Baer,
Respondent

On Writ of Certiorari to the
Supreme Court of New Hampshire

BRIEF FOR RESPONDENT

Submitted by,
Doherty & Dyer
144 Pleasant Street
Laconia, New Hampshire

McLane, Carleton, Graf, Greene & Brown
40 Stark Street
Manchester, New Hampshire

Stanley M. Brown
40 Stark Street
Manchester, New Hampshire

Attorneys for Respondent

TABLE OF CONTENTS

	PAGE
Index of Authorities Cited	i
Opinions Below	1
Constitutional Provisions Involved	2
Questions Presented	3
Statement of the Facts	5
The jury findings and limited appeal	26
Argument	29
I. Respondent was not a "public official"	29
II. The *Sullivan* and *Garrison* decisions should not be extended to apply to this case	33
III. There was evidence of malice below	37
VI. Lawful occasion and malice are jury issues where extrinsic facts are relied upon that affect the character of the writing	41
Conclusion	45

INDEX OF AUTHORITIES CITED

CASES:

Adams v. Murphy, 91 CCA 272, 165 Fed. 304	29
Baer v. Rosenblatt, 106 N. H. 26	2
Bailey v. Charlestown Mail Assn., 126 W. Va. 292	44
Barr v. Matteo, 360 U. S. 564	30, 46
Barrett v. Long, 3 H. L. C. 395	38
Barry v. Glenn County, 42 Cal. App. 2d 76	32
Beaudin v. Company, 94 N. H. 202	40
Blanchard v. Claremont Eagle, 95 N. H. 375	43
Carpenter v. Bailey, 56 N. H. 283	42
Chagnon v. Union Leader Corp., 103 N. H. 426	4, 28, 34, 43
Dane v. McGregor, 94 N. H. 294	40
Davis v. State, 94 N. H. 321	40
Dodge v. Clair, 105 N. H. 276	37
Downie v. Proctor, 101 N. H. 1	40
Farley v. Board of Education, 62 Okla, 181	29, 30

PAGE

Friedell v. Blakely Printing Co., 163 Mich. 226 45
Garrison v. Louisiana, 379 U. S. 64 ..... 2, 36, 40
Graves v. City of Ponder, 303 S. W. 2d 485 (Tex. Civ. App.) 32
Hogan v. N. Y. Times, 313 F. 2d 354 44
Hutchins v. Page, 75 N. H. 215 43
Lafferty v. Houlihan, 81 N. H. 67 43
Lawrence v. Fox, 357 Mich. 134 43
Martin v. United States, 93 CCA 484, 168 Fed. 198 29
Matassa v. Bel, 246 La. 294 45
McLean v. Merriman, 42 S. D. 394 44
Moore v. Butler, 48 N. H. 161 42
Mosby v. Board of Commissioners of Vanderburgh County, 134 Ind. App. 175 32
New York Times v. Sullivan, 376 U. S. 254 2, 33, 43, 46
Opinion of the Justices, 73 N. H. 621 29
Palmer v. Concord, 48 N. H. 211 43
Pauling v. News Syndicate Company, 335 F. 2d 659 33
Phoenix Newspapers v. Choisser, 82 Ariz. 271 44
Ponder v. Cobb, 257 N. C. 281 43
Richards v. Rizzi, 99 N. H. 327 37
Ricker's Petition, 66 N. H. 207 ..... 29, 31
Saladino v. Gurdy, 80 N. H. 211 39
Salinger v. Cowles, 195 Iowa 873 44
Shackett v. Bickford, 74 N. H. 57 39
Slocinski v. Radwan, 83 N. H. 501 43
Snively v. Record Publishing Co., 185 Cal. 565 44
State v. Browne, 86 N. J. Super. 217 45
State v. Burnham, 9 N. H. 34 ..... 35, 36, 39
State ex rel Barney v. Hawkins, 79 Mont. 506 29
State ex rel Landis v. Board of Commissioners of Butler County, 95 Ohio St. 157 32
State ex rel Wickens v. Clark, 208 Ind. 402 32
Stice v. Beacon Newspaper Corp., 185 Kan. 61 44
United States v. Maurice, 2 Brock 96 29

PAGE

Wiggin v. Manchester, 72 N. H. 576 ..... 29, 31
Zenger, John Peter, 17 Howell's St. Tr. 675 47
Zielinski v. Cornwell, 100 N. H. 34 41

OTHER AUTHORITIES:

Constitution and Statutes:
United States Constitution,
Seventh, Ninth and Tenth Amendments 2, 3, 27, 45, 46
New Hampshire Constitution,
Part 1, Articles 12, 14 and 20 ..... 2, 45, 46
N. H. Laws, 1953, Ch. 344 ..... 5, 30
N. H. Laws, 1959, Ch. 399 7
N. H. Rev. Stat. Ann., Ch. 7, Sec. 33 32
Ch. 21, Sec. 25 32
Ch. 23, Sec. 2 ..... 5, 30
Ch. 24, Sec. 13, 15 5
Ch. 25 31
Ch. 27, Sec. 1 32
Ch. 28, Sec. 4, 5, 6, 7 5
Ch. 29 32
Ch. 92, Sec. 2 32
Ch. 104 32
Chap. 478 32
Chap. 499 31
Chap. 548 32

MISCELLANEOUS:
33 Am. Jur., Libel and Slander, s. 266, p. 248 39
Goodhart, Freedom of Speech and Freedom of the Press,
1964 Wash. U. L. Q. 248 46
1 Harper and James, Law of Torts, s. 5.27, p. 455 39
Mechem, Public Officers, s. 5 31
Pedrick, Freedom of the Press and the Law of Libel: The
Modern Revised Translation, 49 Cornell L. Q. 581 .... 46, 47
Restatement of Torts, s. 598, comment a 24, 35
Wigmore on Evidence (3 Ed.), ss. 403, 404 38

Supreme Court of the United States

No. 38

October Term 1965

Alfred D. Rosenblatt,
Petitioner

vs.

Frank P. Baer,
Respondent

On Writ of Certiorari to the
Supreme Court of New Hampshire

BRIEF FOR RESPONDENT

OPINIONS BELOW

This is an action for libel and trespass of the respondent Baer, a private citizen, by the petitioner, Rosenblatt, also a private citizen, based upon a newspaper article written by Rosenblatt on January 28, 1960, and published in the Laconia Evening Citizen on January 29, 1960, which respondent claimed to have been false, scandalous, malicious, defamatory and untrue.

Trial by jury in Belknap County Superior Court in April of 1963 resulted in a plaintiff's verdict of $31,500 and motions to set aside on usual grounds (Reserved Case, 24) were, after hearing, denied. (Reserved Case, 25) There is no opinion of the Superior Court, reported or unreported, under these circumstances.

A *limited* appeal to the Supreme Court of New Hampshire (Reserved Case, 1) was argued on June 2, 1964, and decided

sub nominee, Baer v. *Rosenblatt,* No. 5211, on October 6, 1964, the order being "Judgment on the Verdict", and is reported in 106 N. H. 26. A copy of this opinion is printed as an appendix to the Petition for Writ of Certiorari starting at page 15, and again as an appendix to the Brief for Petitioner starting at page 42.

On March 15, 1965, this Court granted petitioner's petition for writ of certiorari and counsel were directed in addition to argue the question whether, at the time of respondent's employment as supervisor of the Belknap County Recreational Area, he was a "public official" under the decisions of this Court in *New York Times* v. *Sullivan,* 376 U.S. 254 and *Garrison* v. *Louisiana,* 379 U.S. 64, both cases having been decided after the trial in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of New Hampshire, Part 1

Article 12th: "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty and property. . . . But no man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. • • •"

Article 14th: "Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character. . . ."

Article 20th: ". . . In all suits between two or more persons . . . the parties have a right to a trial by jury and this method of procedure shall be held sacred, . . ."

Constitution of the United States

Seventh Amendment: "In suits at common law, . . . the right to jury trial shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

QUESTIONS PRESENTED

This review is of a constitutional jury trial in which respondent's constitutional remedy for injury to his character was exercised by recourse to the common law. Only those issues which were preserved by objection and exception in Superior Court were open in the Supreme Court of New Hampshire; issues foreclosed by failure to have appealed to that Court are not open here.

We believe that the questions properly before this Court are considerably less broad than stated by petitioner in his brief, as a result of the limited nature of the appeal to the Supreme Court of New Hampshire and waivers which occurred during trial in the Superior Court.

Since the Trial Court *did* allow the defense of qualified privilege, the first question posed by both the Petition and petitioner's Brief seems to us not to be before this Court.

We believe the questions properly before the Court are:

I.

Whether respondent was a public official at the time of his employment as supervisor of Belknap County Recreational Area. We say he was not.

II.

Whether the *Sullivan* and *Garrison* federal constitutional rules should be extended to apply to this case. We say they should not.

III.

Whether there is competent evidence of malice in the record. We say there is.

IV.

Whether the Trial Court's charge incorporating the language of *Chagnon* v. *Union Leader Corp.*, 103 N. H. 426, 438, 174 A. 2d 825, 833 (1961) *cert denied*, 369 U. S. 830, 7 L. ed 795, 82 S. Ct. 846, which was inferentially approved in *Sullivan, supra*, at footnote 20, properly left to the jury the defense of qualified privilege relied upon by petitioner. We say that this charge was proper as the law of the trial in view of the requests submitted by respondent when the case was tried in 1963, and petitioner's failure to object or except to instructions given.

Since the answers to the questions at issue depend upon the record below, rather than on abstractions, we brief the trial record in detail here.

STATEMENT OF THE FACTS

Belknap County, since depression days, has owned and operated as a proprietary recreational business, the Belknap County Recreational Area in Gilford, New Hampshire (3 T. 155). The public officials in charge of this facility as a County operation until September 15, 1959, were the three elected County Commissioners (N. H. RSA 1955, *c.* 28, *ss* 4, 5, 6, 7; *c.* 23, *s.* 2). The County Commissioners in turn are subordinate to the County Convention with respect to raising and appropriating money, making major expenditures and borrowing (RSA 24:13, 15). From 1945 forward counties were authorized by statute (RSA 23:2) with regard to recreational areas, to "employ such supervisors, instructors and other officials as may be necessary". No statutory delineation of the powers or duties of such supervisors of recreational areas, nor provision as to salary, title, or tenure has ever been enacted.

In 1950 the then County Commissioners hired Frank P. "Fritzie" Baer as supervisor of the Belknap Recreational Area, to devote his entire time to its affairs—"at least eight hours a day, six days a week" for $6,500 a year plus expenses. The contract was for one year, terminable, however, by the Commissioners, on two weeks notice (Exhibit 17; 1 T. 172). Baer worked under this contract until 1953.

At the 1953 Session the New Hampshire General Court enacted Laws of New Hampshire, 1953, *c.* 344, which, in *s.* 2 required that the "manager" of the Belknap Recreational Area be employed by the Commissioners *with the approval* of the County Convention, and that any contract of employment be signed by the Chairman of the Convention after approval by the Convention. This statute did not delineate the powers, duties, salary or tenure of the office, but merely required the Convention's approval of the hiring and contract. Subsequently on November 27, 1953, Baer's contract was re-executed for a two-year period with a salary increase to $7,150, to continue in effect after January 1, 1955 on a *week-to-week* basis subject

to a two-week termination notice by either party (Exhibit 17; 1 T. 172).

Baer worked under this arrangement as supervisor or manager of the Area, with salary increases that eventually reached $8,000 per year, until July 10, 1959, but on a week-to-week basis from 1955 on.

Under these contracts, Baer agreed that he would "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area" (*Para.* 5); "transmit all funds accruing from said recreational area to said County Commissioners at such time and in such manner as [they] shall from time to time prescribe, and that he will transmit all invoices, accounts, bills, statements and other like papers to [them]" . . . (*Para.* 6); to "carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same in accordance with such procedure as may be adopted by said Commissioners" (*Para.* 7).

Other provisions of *Para.* 5 gave Baer the responsibilities and duties of the "Manager" of the Area, but *Para.* 8 specifically withheld from Baer the powers of manager, *viz*:

> "It is understood by and between the parties hereto that the said commissioners are, by law, responsible for managing said recreational area and that said commissioners do not have the power to delegate said managerial powers to the said Frank P. Baer, and that consequently, the said Frank P. Baer, in the performance of his duties hereunder, shall act subject to the direction and control of said Commissioners, in a supervisory capacity: it is further understood that said commissioners shall retain their power relative to hiring and firing personnel, relative to maintenance, relative to construction work, and relative to finances, and that the said Frank P. Baer in supervising such matters will act subject to the direction and control of said Commissioners."

During the ensuing years under Baer's "management", gross annual revenues increased from $53,000 in 1950 to more than $200,000 in 1958, with $980,354.01 being received during the 1950-1958 period (Exhibit 23; 2 T. 71). These revenues were "plowed back" into further development, and when Baer was terminated, the balance sheet assets of the Area totalled $979,257.93, offset by total liabilities of $40,132.19, for a net worth of $939,125.74 (See Exhibit 42; 5 T. 8).

Baer handled the cash received personally, "all the way to the bank". He was "entirely" in charge of collecting it, accounting for it and turning it in (1 T. 172-173, 198, 209, 210).

On June 15, 1959, Laws of New Hampshire 1959, *c.* 399, was enacted, taking control of the Belknap Recreational Area out of the hands of the County Commissioners and vesting it in a 5-man "Area Commission" as of September 15, 1959.

The 1959 act, in its sections 1 and 10, gave the new commission plenary powers to operate, maintain, develop, improve and promote "the Area, as a body politic and as an agency of the County". Its Section 17 provided that upon the appointment of the Area Commission ". . . the County Commissioners of Belknap County shall be relieved of all duties and responsibilities with respect to the operation and maintenance of the Area". Chapter 344 of the Laws of 1953 was repealed, but there was no other reference to the "manager", nor is the "manager" or "supervisor" provided for specifically in the new act.

Upon enactment of the 1959 Act, the County Commissioners, on June 23, 1959, notified Baer that his contract was terminated as of July 10 (Exhibit 20, 1 T. 191). Their reason, according to the Chairman, was to enable the new Commission to hire its own manager with "no strings on the past" (1 T. 194), but expecting that the new Commission would "re-hire Fritzie when it took over in the fall" (1 T. 193). The termination had nothing to do with the manner in which cash

was handled and the Commissioners never had any question about Baer's honesty (1 T. 194, 211-212, 215; 5 T. 12).

Baer also assumed he would be re-hired in the fall (3 T. 171) and in putting out feelers for a new position indicated that he would be available only if he were not re-hired (4 T. 67). He applied for his old job to the new Commission in the fall, but the job was given to an experienced ski area manager, Warren Warner (3 T. 173-175). Baer then began in earnest to seek new work, and was given assurances he could be active again in the motorcycle field, at no less pay than he had received at Belknap (4 T. 18, 21, 81).

Thus Baer was unemployed, looking for re-employment, with his reputation an asset in that quest, on January 29, 1960.

Petitioner Rosenblatt in 1960 was a successful merchant operating Lee's Cut Rate in Laconia and Sterling's Cut Rate in Concord, who owned two pieces of commercial property and his own home (2 T. 56, 63). College educated, he had studied English and journalism, banking and finance and psychology. He had been a radio script writer and news release writer in earlier days in public employ (2 T. 57-61). In his merchant's capacity he was familiar with the daily collection, reconciling, accounting for and depositing of large amounts of cash income, his Laconia store grossing $400,000 annually, his Concord store grossing $250,000 (2 T. 89).

From 1958 on, Rosenblatt gratuitously submitted a daily column to the local newspaper, which was published under the caption "Out of My Head" (2 T. 40, 57-66). He was not writing for pay as a working journalist—he volunteered it without financial recompense. He was not assigned any topic, but wrote whatever he pleased. He had no obligation to submit any particular article at any time, and no deadline to meet (2 T. 74-76).

Rosenblatt knew Baer and also knew that he was the manager of the Belknap Recreational Area (2 T. 81). His col-

umn "Out of My Head" contained the following excerpted comments concerning Baer during the two years preceding the libel complained of (italics added):

December 11, 1958 (Exhibit 24; 2 T. 136):

> "That Belknap County Recreational Area big headache no secret. Nobody satisfied with it. *Not Fritzie Baer, the Manager,* not the County Commissioners who run it, not skiers who use it, not County legislative delegation. • • •
>
> "• • • As is now *Area has never made a dime profit. If properly run could pay all of the County's taxes* and have good chunk left over to spend on schools. Present commissioners have to face facts. Either they do something and do it quick or pretty soon, one of these years, Area not just going to break even but show fifty or a hundred thousand dollar loss. . . ."

In the 1958 calendar year when this piece was written, the Area made a net profit of $53,791.99 on some $206,000.00 of receipts as audited by the State Tax Commission, having made a net profit of $8,886.83 in the prior year, as audited (Exhibit 19, at Exhibit I thereof; 1 T. 188).

December 16, 1958 (Exhibit 25; 2 T. 141):

> "The waiter said, as he looked scornfully at the 12 cent tip for a $1.20 lunch: *'It's correct but it ain't right.' So say most of us when we hear Fritzie Baer speak of the Belknap Recreation Area as 'the million dollar area.'* Probably worth well more than million bucks but what good does it do to people of Belknap County who own it?
>
> "Truth is not worth more than plugged nickel to us unless we happen to be skiers which most of us are not. *Pays no taxes and earns no revenue.* • • •

"This please is NOT criticism of Fritzie as manager. Think that man one of the greatest 'promoters' ever knew but poor guy's hands hogtied by a complete lack of capital for making real improvements. . . .'*

December 20, 1958 (Exhibit 27):

"Thursday's Evening Citizen carried in Letter Box a letter from a real mad man who signed himself as 'Chairman, Belknap Ski Advisory Board'. In first part of letter fellow says reason he's mad is because I big liar. . . . * * *

"*I called Fritzie Baer, manager of the Area,* and asked him what the Belknap Ski Advisory Board was and who appointed it. *Fritzie told me he appointed them himself.* Might also add here that mad fellow happens also to be paid employee of Belknap Area. Gives ski lessons. Gets paid for it."

January 9, 1959 (Exhibit 28; 2 T. 146):

"*Listened to Fritzie Baer the other day at Chamber of Commerce* and he reminded me of Styles Bridges.

---

*One man's dissent from the allegations of this column is illustrated by Exhibit 26, 2 T. 142, 5 T. 93, signed by Arthur Rothafel, Chairman, Belknap Ski Advisory Board, in which Rothafel wrote of Rosenblatt's article:

"How can a publisher whose unquestioned integrity has been a fine influence in this Community permit the unrestricted use of his newspaper's columns to Mr. Rosenblatt? Half-truths, distortions, and downright falsehoods have no place in a reputable newspaper.***

"Contrary to implication in the column yesterday, Belknap Area does pay taxes to Gilford.***

"***A bill calling for the creation of [an Area Authority with power to arrange and implement a long-range program for progressive expansion of Belknap facilities and use] is already being prepared for presentation to the legislature.***

"***Mr. Rosenblatt's concern is belated. The distortions of fact so obvious in yesterday's column do much more harm than good."

When Bridges makes public address he uses up every second of time so there's never any question period. Fritzie did same thing.

"Had whole bunch of questions ready to ask but never got chance. So—going to ask them right now. *Not necessarily of Fritzie,* although of course he welcome to answer them *but of him* AND County Commissioners."

[Some forty detailed fiscal control questions follow seeking answers as to how cash is collected, controlled, accounted for, and spent, including the following:

"3. How is money handled at area? For tickets? For meals? For anything? *Who* counts it? *Who* deposits it? Are register tapes kept, etc., etc. Please explain system.

"5. What is payroll of Area? *To whom paid?* How much?

"6. How are retail operations handled? *Who* is buyer? * * * (concerning inventory:) *By whom* counted? Under what supervision? (From whom are goods, services purchased?) * * * *Who decides?*"

"Who gets free passes to use Area facilities? Now? In past?]

"Is important to remember that asking of these questions should in no way be construed as inference on my part that anything *necessarily* wrong. However, we are often told that Area is 'your Area—YOUR million dollar Area'. OK. If 'my' Area then feel it reasonable to ask above questions as would any reasonable person be interested in business which belongs to him."

The evidence on this trial was that the County Commissioners advised Rosenblatt when these questions were published that he could get all his answers by looking over the detailed records at the County Courthouse, and they *gave* him Annual County reports, but that he never came in for the additional

detailed information. They also instructed Fritzie Baer *not* to answer Rosenblatt (5 T. 1-7).

The answers to these detailed questions were submitted, however, in a letter to the editor by Robert Baer, the "assistant manager" (see Exhibit 30; 2 T. 156), published on January 12, 1959. They indicate that the fiscal control is exercised by the Area Manager:

> "3. Don't believe it necessary to go into detail on how money handled other than to say that all tickets sold as in other public areas, etc., on a number basis and records kept on all tickets printed, sold, etc. Register tapes are kept and all departments audited by the State Auditors. *Money is deposited by manager daily,* so as not to leave surplus of cash in building overnight. Not only are records audited by State, but by a CPA hired by County delegation, and paid for by Area. Also a bookkeeper paid by Area at County Court House. All things pertaining to records were investigated by the special delegation committee this summer looking into Area management, and perhaps Mr. R. will recall their 'clean bill of health' re Area management. If not, will be glad to furnish him with copy of Citizen in which this appeared.
>
> 4. *Hiring at Area is done by Manager* as should be the case • • •
>
> "7. • • • *The question of who decides must be answered with management. Who else? That's what he's there for.* To manage.
>
> "8. The question of *free passes* almost sounds personal. But again, as in Mr. R.'s business, it *is up to management.* • • •
>
> "9. There are no concessions at the Area. *All departments are under direct supervision of Area manager.* • • •
>
> "I have undertaken to answer these questions of Mr. Rosenblatt, not because I feel the Area is obligated to do so, but because personally, I feel they have stirred

up doubts in the minds of many, and all the people in the County have a right to know the true picture."

January 13, 1959 (Exhibit 29; 2 T. 152):

"Two interesting letters in Monday's Evening Citizen. One by Brenda Baer, one by Robert Baer. *Cannot, of course, consider them answers to questions asked of Fritzie Baer and County Commissioners.* Only fair to let them answer for themselves."

January 21, 1959 (Exhibit 31; 2 T. 161):

"Talking about Area questions *have not yet heard from Fritzie Baer, Bill Stafford or Joe Smith. Have series of County reports but not much information in them. Please, gentlemen, let us have answers very soon.*"

January 27, 1959 (Exhibit 32: 2 T. 164):

"Remember questions asked about Area on January 9 in this space. *Fritzie Baer in public speech on Jan. 22 said he was not going to answer them.*

[Thereafter restates questions, in shorter form.]

"Now doggone it what's wrong with those questions? • • • *Why should anyone be unwilling to answer those questions? Would the answers be embarrassing?*

"*If so, to whom?* • • •

"Yet *Fritzie Baer says he will not answer.*

"WHY?

"Can tell you one thing gentle readers. *Maybe Fritzie won't answer the questions. However if he doesn't am sure someone else will.* One thing for sure: Gonna keep on asking them till somebody does."

After having in this manner demanded in public print four separate times that these questions be answered, and having thus complained three times that he could not get the answers, Rosenblatt never acknowledged in his column that he *had*

been supplied the answers, was satisfied, and that there *was in fact nothing wrong* with fiscal control.*

February 14, 1959 (Exhibit 33; 2 T. 170)

> "Read in Evening Citizen about the new bill to create a Belknap Recreation Area Commission. Was first time ever even heard bill being readied. * * *
>
> "Regardless of secrecy . . . bill is as phony as three dollar bill and is virtually useless insofar as making *Area* into something worthwhile instead of *an antique relic run for benefit of one family* and favored friends."

The evidence in this case indicated that Fritzie Baer's wife, son Robert, daughter-in-law Brenda, and a younger son James, worked at the Area at various times, getting the same pay that was given others doing similar work. (See 3 T. 176, 178, 186, 187). No claim was made at the trial that any of the Baers were improperly overpaid.

---

*Yet the 1959 Annual Report of Belknap County (Exhibit 9; 1 T. 85) records that Rosenblatt appeared at the March 2 Budget hearing, asked questions, and was told that "the answers to other questions as to expenses could be found if anyone chose to consult the records in the Commissioners' office" (*p.* 6), and that on April 30, at a hearing on H.B. 319, Rosenblatt spoke, and (*p.* 10):

> "He stated that since the Budget Hearing on March 2, he had been able to find the answers to questions on Area management by reading the records in the County office. He gave excerpts from Area records back to 1945."

And this episode was reported in the Citizen at length (Exhibit 36; 2 T. 184):

> *"Rosenblatt's Research*
>
> "Alfred Rosenblatt had done a great deal of study of the area through county reports dating back to 1945. The area cost $885,000 in 1936 of which the county paid $244,000, he said. At the present rate he said the cost could be $2,500,000. The area he said did not start to make money until public opinion forced the commissioners to hire a business manager. He held the commissioners 'rank failures as recreational operators.' He had a report based on long research but due to the lateness of the hour condensed it."

When Baer was terminated by the County Commissioners on June 23, 1959, the event was made the subject of the Evening Citizen's front page lead story and a front page editorial (Exhibits X, Y; 4 T. 63), and it also made page one of the state-wide newspaper (Exhibit 45; 4 T. 76). Rosenblatt's column came out two days later:

June 25, 1959 (Exhibit 34; 2 T. 171):

"Received whole bunch phone calls last couple of days. Phone call, visits, and on-street stoppings. • • •

"General composite tenor of all calls, visits, was something like this: 'Hey Bigmouth. *Howcum you had nothing to say about firing of Fritzie Baer by Commisshes?*'

"Well only reason could give and can give is *don't know whole story yet.* • • •

"Commisshes responsible for hiring and firing of county personnel. That their legal duty and obligation. *Cannot offhand simply assume they did it without reason. Maybe they had darned good reasons.* Not fair to jump to conclusions without having asked them.

"*After all Fritzie did have substantial portion his own family on county payroll.* Maybe this good—maybe not. *Certainly on face of it, nepotism hardly best public policy.*

"Waters at present too muddy to see bottom. Have to wait couple days."

Rosenblatt never did write whether his assumption that Baer was "fired" for cause was correct. At this trial, no one suggested that the termination was for any reasons involving his honesty or integrity (See 1 T. 194, 5 T. 9-12).

From July 10 on, Baer was a candidate for rehire at the same job. On August 28, Rosenblatt volunteered his view as to whether Baer should be rehired or replaced (Exhibit 35; 2 T. 176).

"New Belknap Area Recreation Commission now confronted with problem of hiring new manager *to replace*

Fritzie Baer. Don't mean presume on their province . . . • • •

"Would like to respectfully suggest, however, that they engage fresh, new, man without any local ties whatsoever.

"If pick any local person will be automatically handicapped by emotional bitternesses lingering from past. New man from out of town, with no local associates will come unsullied and with open mind. Will be able to make dispassionate appraisal of personnel without being prejudiced by personal associations and politics.

"Will avoid criticism of commissioners themselves, for if hire local person will be charged—rightly or wrongly—with playing politics, paying off personal obligations, etc.

"Brand new person seems to me would be best bet."

On September 3, Rosenblatt returned to the same theme, and, although Baer's salary was never higher than $8,000 plus expenses (3 T. 158), and although Baer had a national reputation, wrote (Exhibit M; 2 T. 192):

"If the new Belknap Area Commission decides to engage a manager and pay him *$10,000 per year which is what Fritzie Baer was getting*, then it seems very logical that *can get real top notch person of national reputation and calibre*. With that kind of money do not think Commission can merely sit back and wait for applications from local people."

On Tuesday, January 26, 1960, the new Area Commission Chairman, Dana Beane, introduced the new Manager, Warren Warner, to the Chamber of Commerce at a meeting held at the Area (5 T. 22). Rosenblatt heard the talk. Beane gave no specific financial information in this talk, and no comparative financial data comparing to prior operations (5 T. 24, 34). Warner gave no financial information at all, then or thereafter (3 T. 28-29).

Rosenblatt testified that he thereafter talked to three Area Commissioners by telephone, Beane, Dr. Lacillaide, and Dr. Baker (2 T. 119). Neither Beane nor Dr. Lacillaide recalled that they gave Rosenblatt any specific financial data (5 T. 44; 4 T. 153); Dr. Baker was out of the State and did not testify, but Rosenblatt acknowledged that he didn't recall Baker giving him financial data. There in fact was no comparative financial data in the Commission's possession at the time that covered any period of time (5 T. 42-43).

On Friday, Rosenblatt's column, "Out of My Head", carried the following item (Exhibit 10) (Italics added.):

> "Been doing a little listening and checking at Belknap Recreation Area and am *thunderstruck* by what am learning.
>
> "This year, a year without snow till very late, a year with actually few very major changes in *procedure;* the difference in cash income *simply fantastic, almost unbelievable.*
>
> "On any sort of comparative basis, the Area this year is doing literally hundreds of per cent BETTER than last year.
>
> "When consider that last year was excellent snow year, that season started because of more snow, *months earlier* last year, one can only ponder following question:
>
> "What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results?"

The public reaction was immediate, and readers understood the article to insinuate that Baer, who was the person who handled "all the money last year", and for the nine preceding years, had stolen Area funds:

> "Well, I work at Hounsell's Drug, and everybody that was coming in for cigarettes and papers and so forth was discussing it, so, of course, once I got home I really

wanted to read the article. I understood it was pretty hot. (3 T. 128) • • • Well, it went like wildfire for all of a week. . . ." (3 T. 132)

"When the article first came out, the general trend was, did Fritzie or did Fritzie not take money from the Area, and it seemed to be the consensus of opinion— a lot of guys thought that because he had been fired that maybe that was the reason why he was fired." (3 T. 137)

"I just heard about the column while I was on Main Street. I was quite shocked when I heard about it. • • • [When I got home I] went and read the article and I was even more shocked. • • • It shocked me because one of my good friends had been implied in this article, as I read it, that money must have been taken by him at the Belknap Area." (3 T. 142)

A police sergeant:

"It gave me the impression that Mr. Baer was stealing money from the Area. • • •

"There was discussion. I heard discussion of this article at the police station amongst the officers. • • • [I]t cast some doubt in some of their minds, and the remark was made that if an article was printed to that effect he must have some proof of it or he wouldn't put it in the paper. • • • There must be something to it, yes." (3 T. 124)

A businessman and City Councilor:

"Sticky fingers." • • •

"The article pointed, to me, that Fritzie Baer had been taking funds from the Area." (3 T. 133, 137)

A realtor:

"The next morning when I went into town it was discussed practically everywhere that I would stop (3 T. 143) • • • [T]hey were talking to me that they were

wondering how much money had been taken . . . (3 T. 145) 'The impression' was whether it was Fritzie that had taken the money or probably someone else in his family." (3 T. 149)

A businessman:

"Well, I took it that it meant that Fritzie had been stealing money at the Area. That's the way it came through to me." (4 T. 93)

The Manager of a clothing store:

"Well [my understanding was] that Fritzie helped himself to the funds the previous year." (4 T. 126)

Comments of others recalled by a school janitor:

"Well, what's the guy got, sticky fingers?"

"'Well, no wonder he's driving a Cadillac'" (4 T. 134)

After hearing such discussion the effect on the witness was:

"'Well, I was starting . . . to get the idea that maybe he *was* pulling something out of the till up there.'" (4 T. 136)

The Executive Secretary of the Lakes Region heard the insinuation discussed throughout the ski area (5 T. 15) where Baer was very well known (5 T. 16), and at ski industry meetings as far away as Concord (5 T. 17). A ski school instructor heard it discussed at the Mt. Mansfield Ski Area in Vermont (3 T. 85).

Why did readers consider that the insinuation was directed at Fritzie Baer?

"Fritzie had become almost the personification of that Area. He, in the minds of the public, and, for that matter, in my mind, was the operator of the Area, period." (3 T. 79)

The Laconia Post Master related it to:

> ". . . [T]he man that's directly in charge of the Recreation Area, which at that time happened to be Fritzie Baer." (3 T. 113)

The police sergeant:

> "Because of the fact that Mr. Baer was the Manager, and I know that he had practically full control of the money that came in because of the fact that my wife worked there just prior to this article as well." (3 T. 124)

The extent and nature of the discussion of the article in the Town of Gilford was reflected in the public school where Fritzie's granddaughter, Ellen, was a fourth grade student. The teacher recalled:

> "Ellen was a very intelligent child and a very excellent student, and I suddenly noticed that she seemed most unhappy, very nervous, very inattentive. I must say that I had reason to believe that I knew the reason, but, of course, I never make any comment to a child in that way; but at one recess time, Ellen came screaming into the classroom with several children behind her and, of course, in the vernacular of the school child said, 'Mrs. Barnard, the kids are teasing me terribly. They're saying awful things.' So as every classroom teacher has to handle a situation, I calmed the class—of course, there were those children who were for and those who were against, and I, of course, said to her, 'Why, my dear, what are they saying?'. And this is exactly what she said: 'They are calling my grandpa and my daddy a thief. It said so in the paper'. I quieted the class, and I gave them what you would term a talking to. I simply explained to the children that regardless of what we read in the paper that we do not tease other people about it. If it concerned their family, we certainly said nothing about it, and that I wished never to hear any of my class bother her again.

> As far as I know, the children in my class did not. However, I do know that Ellen was taunted again on the playground because she began to wish to stay in and not go out. " • • Ellen was never the same child in my classroom. She was what you might call a blithe spirit until that winter. From then on, she was a very different child." (5 T. 63-64)

Plaintiff Baer was called and asked if *he* had read the article, before his paper arrived. When he read it, and he read it several times, he understood it to imply (3 T. 179):

> "It was absolutely no question in my mind, I being the man who had charge of the money, charged by the Commissioners, counted the money, took it home and counted it, had complete charge of it, that I had been stealing thousands of dollars, literally thousands of dollars."

He went to Dana Beane, Chairman of the Area Commission, to find out why the story had been released. Beane told him he "had *never given any*" financial information out which would justify the story (3 T. 188), that he "had given out no figures, nor any member of his Board" (4 T. 14). He also went to the County Commissioners and they assured him that they had given out no figures from the prior year for comparison (4 T. 14-15). He did no further investigation, but waited for a further article of explanation (4 T. 73). He asked for no apology or retraction, feeling that "the damage was already done" (4 T. 72, 74). He sought counsel:

> "Because of the constant reaction I got from people downtown and what happened in Gilford, I just had to decide I'd have to do something" (4 T. 75).
>
> "It got to be uncomfortable."
>
> "People would stop talking when I came to them. If I'd come into a crowd, the conversation would automatically stop."

"It made me very sick • • • [D]iscouraged and downhearted." (4 T. 16).

After a couple of weeks of this, "Fritzie disappeared, sort of" (3 T. 86)—he spent his time at the Weirs working on a house he had purchased, "to occupy my mind" (4 T. 17, see 3 T. 147). He was mentally depressed for two months or so, and in no condition to be seeking a job (4 T. 169).

Whereas before the publication, there were apparently many people who would have hired Baer in the same general line of work for at least as much money (4 T. 18, 21), after the article there was a definite change in the attitude (4 T. 19). As Mrs. Baer expressed it "[T]here was just a coolness that set in, and I can't describe it" (4 T. 172).

The effect of the article still continued to the date of trial (4 T. 172, 3 T. 24); discussion of it comes up when Baer's name is mentioned; it really "never ended" (3 T. 125, 134).

Baer never received any offers of new jobs (4 T. 19). He made himself available for the position of Executive Secretary of the Laconia Chamber of Commerce, but his name was not submitted for reasons explained to him (4 T. 24, 26). Precisely what happened is unclear on the record (compare 4 T. 125, 5 T. 104-108 and 118 with 5 T. 110, 121, 3 T. 84, 91-92), but Baer did not get the job. He eventually went into real estate selling, a job for which he had no prior training (4 T. 19, 70).

His earnings from 1954 through 1962 are compiled in Exhibit 44. (4 T. 23). While he earned between $7,100 and $8,000 during 1954-1958, his 1960 earnings were not over $300, and in 1961 he earned about $6,400, in 1962, about $6,000 (Exhibit 44, see 4 T. 21-24). Thus reduction of earnings of $1,500 to $2,000 after the article (plus 1960's complete loss) were in evidence. Baer was 61 at the time of trial and his life expectancy was 15.44 years (5 T. 135).

Petitioner Rosenblatt's deposition was taken before trial, and he was called in plaintiff's case and testified at length. His

credibility was placed in issue and he repeatedly and patently lied in an effort to avoid liability (See 2 T. 81-175 generally; 2 T. 174-175 particularly). He was specific as to his use of language in the article, however:

1. The period of time he intended to compare during which he wrote that "difference in cash income simply fantastic, almost unbelievable" was "in the comparative period *from the time the new Commission took over* [*September 15, 1959*], *as against a similar period of time prior to the time they took over* (2 T. 93-96, 187).

2. The phrase "cash income" was intended to refer, specifically, to the *gross receipts* at the Area (2 T. 89-92).

3. In writing "on any kind of a comparative basis, the Area this year is doing literally hundreds of per cent better than last year", Rosenblatt used the word *literally* to emphasize to his readers that this was, *as a matter of fact* true, and not an exaggeration; he used "hundreds of per cent" to indicate an improvement of more than 100%: "more than twice" (2 T. 106).

Since he wrote the article on either January 28 or 29, he had no knowledge of, made no reference to, and obviously was not referring to cash receipts that were generated *after* January 28 in January (2 T. 115).

As a matter of fact, there was no significant change in the "cash income" being experienced at the area. The evidence was that gross receipts during both periods, with the exception of petty cash requirements, were deposited (4 T. 6; 3 T. 33-35). Factually, Baer deposited $65,471.17 during the period Sept.-January inclusive; in the following year the deposits were *less*, $53,396.93 (1 T. 54, 57). Making adjustments to convert these figures to Sept. 15-January 30 periods, and eliminating non-operating revenue, (2 T. 102-103), it appeared that this

period in Warner's year grossed $53,396.00 against Baer's $52,-756.00 (2 T. 105).*

Thus it appeared that *in fact* there was no disparity of "cash income" at all that justified writing about it.

If only that portion of the period during which there were snow be compared (Rosenblatt suggested this as the period, too, 2 T. 93), the results, *up to the time of Rosenblatt's article on January 29* showed (5 T. 49):

Baer's December-January	$49,775.49
Warner's December to January 29	$49,932.59

Consequently, here again there was no disparity that would occasion a publication. See Restatement of Torts, §598. Neither was there any betterment in the "net cash results" as it turned out. In spite of all the 1960 improvements which included more restaurant space, ticket price increases, etc., percentage-

---

*While various adjustments to the financial data may be suggested, and were below, to achieve direct comparison, precise accuracy or complete equality is not the issue toward which this evidence was introduced. The libel charged that "*difference*" in cash income between the two years was "*simply fantastic, almost unbelievable.*" The extent of "difference" charged is made specific, factually, as "literally hundreds of per cent BETTER than last year." Rosenblatt acknowledged that he used "literally" accurately, to indicate that this was 'as a matter of fact true', "a fact literally true." (2 T. 106) No adjustments could be suggested that would warrant this conclusion of fact.

Defense counsel below inferentially acknowledged that this was a desperate situation for the defense. They attempted to ignore the September-January period actually being compared, and emphasized that January to January figures ($21,000 to $51,000) showed 1960 "over two hundred per cent" better than 1959 (1 T. 159); ignoring the fact that Rosenblatt could not have been comparing records not yet made (2 T. 115; 5 T. 73), and that snow conditions explained the existing difference. They recklessly compared a specific single 1960 weekend in which Warner's regime has $11,800 of receipts against Baer's $1,700 the prior year (5 T. 70, 71), apparently without realizing that ski conditions on the 1960 weekend were optimum (5 T. 79, 80) and on the same weekend the previous year, there was little or no skiing because conditions were "Bad" (5 T. 81, 82). The witness who gave them these figures acknowledged that it was not a valid comparison.

wise Baer's last year was as good as Warner's first year (4 T. 162). Consequently, as a matter of fact, there was no occasion to suggest either that "cash income" had disappeared or that "net cash results" were questionable. This indicates an ulterior purpose in the writing—not a public interest piece on a lawful occasion.

The petitioner himself admitted (2 T. 88):

> "Had I not been told that there was a great difference between that January and the other January, I would probably not have had occasion to write the article."

On the evidence, he was *not* told that there was any such difference, and the difference did not in fact exist.

Rosenblatt claimed that his sources of information were Warner and three members of the Area Commission; that the fiscal information he relied on was entirely acquired by telephone calls to Dr. Baker, Dr. Laccillaide and Dana Beane, Jr. He acknowledged that he was shown no fiscal data, did no checking of public records as to prior years, and had no notes or other memoranda to support his claim (2 T. 118-123). The jury was free to disbelieve Rosenblatt's claim in the face of the undisputed evidence that such facts did not exist and the failure of his supposed "sources" to support his claim. Warner was specific that he gave Rosenblatt no financial information (3 T. 28, 29). Dr. Lacillaide was specific that he gave no such information (4 T. 153, 154). Dr. Baker was not presented as a witness, being out of the State. Beane, a C.P.A., and testifying circumspectly (his personal counsel was trial counsel for Rosenblatt (5 T. 41)) nevertheless said *he* gave Rosenblatt no internal figures, *had* no formal statements at that time to present to anyone, for either December or January; that anything he *may* have told Rosenblatt would have been fragmentary (5 T. 42-44) and general (5 T. 77).

Beane knew the Area was not doing "literally hundreds of per cent better than last year" (5 T. 21, 26, 34). While the Commission had financial information which would permit

daily receipt comparison to days in the prior year, they were *not* comparing accumulative receipts, and had no such figures (5 T. 32-34). Beane was specific that he did not give Rosenblatt any information with respect to the period claimed to have been compared—September 15 to January in each year—(5 T. 34). Beane did not have December 1959-January 1960 figures available until after a February 1, 1960 meeting, and hence could not have given Rosenblatt comparative data for the snow seasons or for the Januarys separately (See 5 T. 41-50). When the figures were finally produced in February, they showed no increase that would justify the article Rosenblatt wrote (5 T. 51-57).

On the entire record digested above, the jury was at liberty to conclude that Rosenblatt was given no information from any of his claimed "sources" that prompted or justified his publication; that there was no factual basis for the writing; and that Rosenblatt deliberately prevaricated his "facts" with a reckless disregard for whether they were true or false for the malicious purpose of provocative defamatory insinuation that Baer was dishonest. Since the evidence warrants such a finding, the record, viewed on appeal after a general jury finding for plaintiff, is to be considered on the basis that such is the fact.

The jury findings and limited appeal.

The special declaration of this common law writ alleged that the defamatory innuendo of the publication declared upon was that respondent *"had committed larceny, that he had stolen or embezzled or converted to his own use large amounts of money belonging to the Belknap Recreational Area. . . ."* See R. C., *p.* 3, lines 19-25, 26-32, 37-42, 43 to *p.* 4, line 5, 7-12. As the case was tried, no one claimed Baer was a public official, and Rosenblatt denied he wrote of Baer at all. The case was submitted for jury determination of the factual issues under a charge that began with this instruction (5 T. 147, 148, italics added):

"The first issue in the case is whether or not the language in the article, or any part of it, was *used* in a defamatory sense *and* was so *understood* by the readers. As I said, Mr. Baer (148) has the burden of proof on this issue. . . ., and *he must make it appear a little more probable than otherwise that the language was used by the defendant in a defamatory sense and that it was so understood by the readers* of the column; and unless the plaintiff so satisfies you that it is a little more probable than otherwise that all, or some part, of the language in the article was *used* in a defamatory sense *and so understood* by the readers, then you should return a verdict for the defendant, and that's the end of the case.

"You should understand that it must be used and understood in a sense which is derogatory and defamatory of the plaintiff himself, Mr. Baer."

The jury's general verdict for the respondent (plaintiff below) therefore imports a finding of fact that petitioner *used* the language in the article declared upon to insinuate that respondent Baer personally had stolen, embezzled or converted to his own use money of the Belknap County Recreational Area.

Petitioner has admitted below that the factual issues on this phase of the case were properly left for jury determination, and the Supreme Court of New Hampshire agreed. Article 7 of the Amendments to the Constitution of the United States requires that those facts not be re-examined by any court of the United States.

The facts related in the article declared upon were proven to have been wholly false, and the insinuation was not only proven false; it was admitted to be false below (1 T. 29).

Thus a *false* insinuation of Baer's being a thief or embezzler is to be assumed to be involved.

The case was tried prior to the *Sullivan* decision, under the law of *Chagnon* v. *Union Leader Corp., supra,* 103 N. H. 426, of which certiorari was denied by this court, 369 U. S. 830.

Under the *Chagnon* rule the jury was instructed, *without objection or exception,* that they might return a plaintiff's verdict in the absence of malice, but that if they found malice they might award more liberal damages (5 T. 160). No appeal was taken from this aspect of the charge, and none lay inasmuch as no exception was saved in the trial court (5 T. 165 *et seq*). Not only is the point waived, however, the petitioner in the Supreme Court of New Hampshire acknowledged, and that Court presumed, that the jury verdict was premised upon a *finding* of malice, because it is discernible from the amount of the verdict that exemplary damages are included. Consequently, that aspect of the charge appears to be moot here, and petitioner does not argue it.

The trial court's definition of malice was similarly not excepted to, nor was the instruction that "reasonable belief" in the truth of what he wrote was required to sustain a defense of privilege. Consequently, we believe that neither of these two matters are properly before this Court, they having been waived by petitioner in Superior Court in 1963.

ARGUMENT

I.

Respondent Baer, at the time of his employment as supervisor of the Belknap County Recreational Area, was not a "public official" under the decisions in New York Times Co. v. Sullivan, 376 U.S. 254 and Garrison v. Louisiana, 379 U.S. 64.

We rely upon the settled law as set forth with ample citation of authority in *State ex rel Barney* v. *Hawkins*, 79 Mont. 506, 257 Pac. 411, 53 ALR 583 (annotated on the point at 595) that respondent Baer was a public employee, not a public official, when employed as supervisor. Both the law of New Hampshire (*Opinion of the Justices*, 73 N. H. 621, 62 A 969; *Wiggin* v. *Manchester*, 72 N. H. 576, 58 A. 522; *Ricker's Petition*, 66 N. H. 207, 29 A. 559) and Federal law (*Martin* v. *United States*, 93 CCA 484, 168 Fed. 198; *United States* v. *Maurice*, 2 Brock 96; *Adams v. Murphy*, 91 CCA 272, 165 Fed. 304) recognize this settled law. See also annotations, 93 ALR 333, 140 ALR 1077.

> "Practically all of the authorities . . . hold that to an officer are granted some of the sovereign powers of the government, to be exercised for the benefit of the public. They hold, also, quite generally that an officer's duties must be prescribed by law, and that he must be independent in the exercise of them, and not subject to orders from a superior as to the nature or discharge of his duties, . . . * * * Those two rules, stated above, delegation of sovereign power and independent exercise of it, . . ., appear to be general."
>
> *State ex rel Barney* v. *Hawkins, supra*, 53 ALR at 589.

> "The duties of an officer are fixed by law, and an employment arising out of a contract, whereby the person employed acts under the direction and control of others, and which employment depends for its duration and extent upon the terms of such contract, is not an office. . . . While an officer may be appointed by constituted authority, yet in the discharge of his duties, he knows no

guide but the established law, and cannot be lawfully directed by others in the conduct of his office." *Farley* v. *Board of Education*, 62 Okla. 181, 162 Pac. 797.

Analyzed under this settled law, Baer's contract was one of public employment, but he was not a public official.

The 1945 enabling act (RSA 23:2) which authorized counties to employ "such supervisors, instructors and other officials as necessary" prescribed no duties and conferred no powers on persons who might be hired: it merely authorized such persons to be employed. The 1953 act (Laws 1953, *c.* 344) similarly granted no powers to the manager and conferred no sovereign powers upon him, but merely required the County Commissioners to obtain prior approval from the County Delegation with regard to such a hiring. The statute specifically recognized that the position was one to be established by an employment contract to be negotiated, as distinguished from an office the outer perimeter of the line of duty of which is drawn by statute and redelegation of specific powers, as was involved in *Barr* v. *Matteo*, 360 U.S. 564, 574-5, 3 L. ed. 2d 1434, 1441, 79 S. Ct. 1335.

If the issue were considered to be close, *the contract itself* (Exhibit 17; 1 T. 171, 172) *is specific, factually,* in its Paragraph 8, *that no managerial powers were delegated to Baer,* and that Baer "in the performance of his duties hereunder, shall act subject to the direction and control of said Commissioners, in a supervisory capacity."

In point of fact, Baer undertook the job on that basis, as the following examination of Commissioner Smith makes abundantly clear:

> *Mr. Bownes*: "And there isn't any doubt that as far as the Commissioners and Mr. Baer were concerned, the control of the Area was by law vested in you [*i.e.*, the County Commissioners]?"
>
> Mr. Smith: "That's right."

"Q. And you had management of the Area by law?
"A. That's right.
"Q. And that Mr. Baer understood when he took over?
"A. Yes, sir."

Examples of the degree of control exercised by the Commissioners are referred to in the record. When Rosenblatt insinuated that the public needed information concerning fiscal controls at the Area which he wanted Baer to supply by answering his published questions (Exhibit 28; 2 T. 146, the questions "should in no way be construed as inference on my part that anything necessarily wrong". . . .), the Commissioners *instructed* Baer not to answer Rosenblatt (5 T. 1-7; 4 T. 50-51), and Baer obeyed (Exhibit 32; 2 T. 164). See also 1 T. 66, 72, 76, 172, 204-207; 4 T. 36, 38, 40, 41, 43; 5 T. 9. During the summer of 1959, the Commissioners operated the Area with *no* manager, after terminating Baer (1 T. 220).

Chief Justice Doe of the Supreme Court of New Hampshire stated our concept aptly in *Ricker's Petition, supra,* 66 N. H. 207, at 231, by quotations from MECHEM, PUBLIC OFFICERS, *s.* 5:

> "'A public office . . . is never conferred by contract. . . . Where, therefore, the authority in question was conferred by contract, it must be regarded as an employment, and not as a public office.'"

Wiggin v. *Manchester, supra,* 72 N. H. 576, involved employment by the City of Manchester of a janitor by contract, and a transfer to a Police Commission of the authority to hire. Both janitors were held employees; they did not achieve public official status merely because the authority to employ them was based upon statutes.

Other local statutes specifically create *county offices* in New Hampshire, the incumbents of which are public officers, *e.g.*, county clerks of court (RSA 499), county auditors (RSA 25),

county treasurers (RSA 29), county attorneys (RSA 7:33), sheriffs (RSA 104), registers of deeds (RSA 478), registers of probate (RSA 548). *In every instance,* the duties of the county public office are specifically outlined in the statute creating the office. All are required to give bond before performing any official act (RSA 27:1).

Public officials are sworn to the faithful performance of "the duties of their offices" (RSA 21:25) and may not act in "*any public office under any law*" in New Hampshire unless and until so sworn (RSA 92:2).

Since Baer was not sworn, and was not required to be bonded, he was not a public officer under the laws of New Hampshire.

Nor is it unusual nor inappropriate that such positions not be public offices. *Mosby* v. *Board of Commissioners of Vanderburgh County,* 134 Ind. App. 175, 186 NE 2d 18 (1962) is directly in point, for there a park manager hired by the county park board under a statute similar to RSA 23:2 was held to be an employee and not a public officer. In *State ex rel Landis* v. *Board of Commissioners of Butler County,* 95 Ohio St. 157, 115 NE 919 (1917) the clerk to the Board of County Commissioners was held not to be a public official; the manager of a county water district was held an employee in *Graves* v. *City of Ponder,* 303 SW 2d 485 (Tex. Civ. App. 1957); in *Barry* v. *Glenn County,* 42 Cal. App. 2d 76, 108 P 2d 81 (1940), a county purchasing agent hired on a month to month basis and completely subject to the direction of the commissioners was held an employee; and in *State ex rel Wickens* v. *Clark,* 208 Ind. 402, 196 NE 234 (1935), it was held that the superintendent of the county asylum and farm was an employee.

We rely upon the facts and the law as above briefed to demonstrate that respondent Baer was not a public official at the time of his employment, by contract, as supervisor of the Belknap County Recreational Area.

II.

The rationale of New York Times Co. v. Sullivan, 376 U.S. 254 and Garrison v. Louisiana, 379 U.S. 64 should not be extended to apply to public employees, nor to apply to this case.

We recognize that this Court, in footnote 23 to *Sullivan, supra,* declined to attempt to delineate "how far down into the lower ranks of government employees the 'public official' designation would extend" for the purposes of the *Sullivan* rule. We would respectfully suggest that the objective tests of statutory delegation of sovereign powers, which are to be independently exercised, under oath of fidelity to the public body for whom the officer acts, which are discussed above, should set the outer limits of the doctrine. If the Court extends the rule *beyond* this point, the option is to extend it to all persons in public employ, or to create a hodge podge in which the duties of employees, undefined by any public record, becomes the test.

The Second Circuit observed, in *Pauling* v. *News Syndicate Company,* 335 F. 2d 659 (2 Cir. 1964) at 671:

> "We realize that the sole point actually determined by that decision [*Sullivan*] was that the First Amendment requires a state to recognize a 'privilege for criticism of official conduct' [citation] extending to misstatements of fact, this being regarded as in some way the reciprocal of the privilege of federal officials for defamatory statements 'within the outer perimeter' of their duties [citing *Matteo*]. Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension. . . . Once that extension is made, the participant in public debate on an issue of grave public concern would be next in line, ..."

Public employees, as distinguished from public officials, do not ordinarily engage in public debate on matters of grave public concern, *as representatives of government.* Having no portion of the public sovereignty delegated to them, their participation in the "public debates" is and must be as individuals. They therefore are not accorded immunity as to their defamatory statements, since making public statements would in the ordinary case be beyond the "outer perimeter" of their duty as public employees. There is therefore no reciprocal privilege of immunity in the ordinary employee situation that would justify applying the rationale of *Sullivan.*

We interpret *Sullivan* and *Garrison* to establish a Federal rule with regard to criticism of "official conduct" of "public officials", as a distinct rule for those limited cases where official conduct (*i.e.*, execution of sovereign power) by a public official (*i.e.*, one having a duty to exercise sovereign power) is criticized. We do not understand these cases to limit the scope of the freedom of speech and press to report, discuss and comment on public affairs to those limited areas. Thus in *Chagnon* v. *Union Leader Corp.*, 103 N. H. 426, 174 A. 2d 825 (1961), the conditional privilege to criticize a private contractor fulfilling a public contract was recognized by the New Hampshire Court, although Chagnon was not even a public employee. Similar situations could be multiplied without end wherein discussion of public affairs may not involve official conduct of public officials and where libel of individuals is the result. In such instances, where the person libelled does not occupy a public office, and hence has no immunity with respect to his participation in public debate, as was the case here, we submit that neither *Sullivan* nor *Garrison* have application.

There is one further aspect of this case which should remove it from the concern of this Court on constitutional grounds: *the libel complained of, in fact, was not part of any "debate on public issues" which need be uninhibited.* It was an isolated, uncalled-for, and factually unjustified gratuitous slap at Baer

personally, months after he had completed his public employment.

There was in existence no debate as to accounting for funds during Baer's managership. There was no set of facts regarding public money on which the public needed to be informed. There was no suspicion concerning Baer's honesty, and no factual excuse for such suspicion. Rosenblatt *created* the public debate by concocting a false factual premise that more than twice as much public revenue was now being received, and then, using it as a premise, asked his insinuating question, "What happened to all the money last year?"

Since Baer personally handled the cash funds the prior year, from receipt to deposit at the bank, as was public knowledge *and known to Rosenblatt,* the understanding of the readers that the article insinuated that Baer was a thief, was, under the circumstances, almost compelled. Since Rosenblatt is articulate and knows the meaning of the language he uses, it is also an almost compelled conclusion that his use of the language "what happened to all the money last year?" was intended to arouse precisely the suspicion and controversy that it did.

The point we would make is this: the mere fact that a writer couches his libel in terms of a report on public affairs does not *ipso facto* make it a writing on a lawful occasion and therefore privileged. That an unfounded false report creates a public controversy does not excuse it because it becomes part of *that* controversy. There must be *existing* facts which affect an important public interest, and the public interest must *require* the communication of the defamatory matter *before* the lawful occasion for writing arises. (See comment a, Section 598, Restatement of Torts).

> "Where, however, there is merely color of a lawful occasion and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pre-

tense to [write] and circulate defamatory matter, or for some other unlawful purpose, he is liable in the same manner as if such pretense had not been resorted to." *State* v. *Burnham*, 9 N. H. 34, 41-42.

"The use of calculated falsehood, however, would put a different cast on the constitutional question. * * * Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 86 L. ed. 1031, 1035, 62 S. Ct. 766." *Garrison* v. *Louisiana*, *supra*, 13 L. ed. Adv. at 133, 85 S. Ct. at 216.

The petitioner Rosenblatt in this case, as a witness, interpreted his every writing as comment on the official conduct of the County Commissioners, in an overt effort to convince the triers of the fact that he intended no reference to Baer. He patently lied in this effort, as can be discerned at 2 T. 81, 83, 124, 144-146, 184, 169-171, and particularly at 2 T. 174-175. The jurors obviously did not accept these protestations, and their verdict indicates that they were satisfied that this defense was not made out in fact.

We thus have, in this case, the situation of petitioner arguing below that his attack was directed toward public officials, not toward Baer: but arguing in this Court that, having been disbelieved in his defense below, this Court should exonerate him by extending *Sullivan* and *Garrison* to cover Baer. We respectfully suggest that, on the record and the jury verdict returned, this Court should not assume the necessary good faith that is an essential part of the lawful occasion for a privileged writing to exist. This is a case of calculated falsehood published for purposes of personal defamation wholly unrelated to any public debate on any public issue.

III.

There was evidence of malice in the record sufficient to support the implied finding of the jury that malice existed, under the Sullivan test. The trial court's definition of malice and use of "reasonable belief" in defining lawful occasion were not objected to below and, having been waived below are not open for review here.

In the appeal proceedings in the Supreme Court of New Hampshire petitioner admitted that the issue of identification of the plaintiff Baer, and the defamatory implication of the article were properly left for the jury's determination and found against respondent. See Defendant's Brief in Supreme Court of New Hampshire, *p.* 7. Petitioner similarly admitted *arguendo* in that brief on two occasions (*pp.* 24, 32) that the jury in fact did find malice to exist. The Supreme Court of New Hampshire, in its decision being reviewed here, likewise assumed that a finding of malice had been made below, because of the relationship of the verdict ($31,500) to the special damages in evidence ($16,500 or more). See Petitioner's Brief Appendix, p. 52-53. This is proper under the rule that presumes that juries follow instructions in reaching their verdicts. *Dodge* v. *Clair*, 105 N. H. 276, 279, 198 A. 2d 12 (1964); *Richards* v. *Rizzi*, 99 N. H. 327, 110 A. 2d 275. With identification, defamation and malice presumably findable and found below, two questions only appear to remain for disposition: (1) whether there is evidence of malice sufficient to support the presumed finding, and (2) whether the jury instructions defining malice are open for review here.

(1) *There was sufficient evidence of malice.* We outlined in considerable detail in respondent's brief below at pages 29-38 the specific evidence of personal animosity shown in petitioner's prior writings, the circumstance of his having written the libel without investigation of its factual premise, the complete lack of any factual basis for the writing, and the absence of any lawful occasion, as each of these categories show malice. We

have briefly outlined this evidence in our Statement of Facts, *supra*, at pages 9-17. The Supreme Court of New Hampshire in its opinion refers to the same evidence as competent evidence of malice (Petitioner's Brief, Appendix, *pp.* 46-49). We rely on the same evidence as being sufficient, under the same authorities, as set forth in our brief and in the decision below.

This case was not tried relying on a presumption of malice arising solely out of a misstatement made by others and negligently published, as was *Sullivan*. Here we have evidence of sporadic but continuous criticism, over a period of nearly two years, of Baer by Rosenblatt which the jury were entitled to find was unreasonable and unnecessary and some evidence of personal malice. Beyond question the badgering of the articles of January 9, 13, 21 and 27, 1959 under the circumstances was malicious. Certainly the article of June 25, 1959, was unwarranted, and indicates a feeling held by Rosenblatt at least since his February 14 article that Baer was bilking the County. All of these writings have one common theme running through them: isn't there *something* wrong in Baer's management of the Area? Isn't that maybe why he won't answer my questions. Isn't that why he was fired? And, finally; We're getting more than twice as much money now that he has gone: what happened to all of of the money last year?

It is well settled law that the state of feelings of one who wrote a defamatory statement may be demonstrated by other writings of the defendant, and malice may be made out from such writings even if the prior writings, considered separately, do not amount to libel. See WIGMORE ON EVIDENCE (3 Ed). §§403, 404. The prior writings are relevant if they appear to be expressions of ill will, on the rationale that malice at the time of the prior writings indicates the probability of malice at the time charged. In this connection, WIGMORE at p. 372, quotes Parke, B., in *Barrett* v. *Long*, 3 H. L. C. 395, 414:

> "A long practice of libelling plaintiff may show in the most satisfactory manner that the defendant was actuated

by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is."

New Hampshire similarly views such evidence. See *Saladino* v. *Gurdy*, 80 N. H. 211, 212, 116 A. 436, 437:

"Anything defendant has ever said or done with reference to plaintiff may be urged as evidence of malice."

Publishing defamatory material without having any reasonable basis for knowing whether it is true or false provides additional evidence of malice. *State* v. *Burnham*, 9 N. H. 34, 44; *Shackett* v. *Bickford*, 74 N. H. 57, 65 A. 252; 1 HARPER & JAMES, LAW OF TORTS, *s.* 5.27, p. 455; 33 AM. JUR., LIBEL AND SLANDER, *s.* 266, p. 248. The malice arises, not because of negligence, but because of writing for publication without caring about the truth of his statement. ". . . If his statement was untrue and he knew it, or if he made it without belief in its truth, or with a conscious indifference, not caring whether it was true or false, the wickedness of his mind is manifest. . ." *Shackett* v. *Bickford*, *supra*, 74 N. H. at 60.

2. *The trial court's instructions on the definition of malice and his use of "reasonable belief" in defining lawful occasion were proper and were the rule of the trial. No appeal was taken from them. Their supposed deficiencies are urged in this Court for the first time.*

This case was tried in April 1963, after this Court had refused certiorari in the *Chagnon* case and prior to the decisions in *Sullivan* and *Garrison*. It was argued on appeal after *Sullivan* but before *Garrison* was decided here.

Under New Hampshire practice, trial counsel submit requests for instructions to the Court before the jury is charged, are given the opportunity to argue for their instructions and be advised how the Court is to charge, before the charge is given,

and given a further opportunity to except to the failure to charge and to the charge as given after the jury has been instructed but before it retires to deliberate. No appeal lies from a charge as given where no exception was voiced prior to the jury being given the case. See *Downie* v. *Proctor*, 101 N. H. 1, 131 A. 2d 68; *Davis* v. *State*, 94 N. H. 321, 323, 52 A. 2d 793; *Dane* v. *McGregor*, 94 N. H. 294, 298, 52 A. 2d 290; *Beaudin* v. *Company*, 94 N. H. 202, 205-7, 50 A. 2d 77.

The exceptions preserved to the charge are set forth fully at 5 T. 163-169. Petitioner's exceptions were taken by Mr. Nighswander (5 T. 165-167) and Mr. Snow (5 T. 167-169). No exception was taken in any way to the trial court's definition of "malice". Consequently, on the appeal to the Supreme Court of New Hampshire petitioner's brief, in its section dealing with exceptions to the charge, contains no complaint about the definitions used (See Defendant's Brief below, "C. The Charge" *pp.* 13-20), because there was no issue on appeal concerning that aspect of the charge.

It is true that in the following section of the brief, properly arguing the position that there was no evidence of malice below (exception preserved, Reserve Case, *p.* 1, line 9), a makeweight argument on definitions appears, but it is not premised on any exception preserved, and none was. Consequently, we submit that there is no issue here concerning the definition of malice employed in the charge by the trial court and approved on appeal by the Supreme Court of New Hampshire.

Petitioner also, in this court, complains *for the first time* that the trial court in charging on the circumstances of lawful occasion used language of "reasonable belief in its truth". This is an obvious effort to achieve exoneration under *Garrison's* ruling that:

> "The reasonable-belief standard applied by the trial judge is not the same as the reckless disregard for truth standard." 13 L. ed. 2d Adv. 135

In the instant case, however, petitioner affirmatively requested precisely the instruction he now complains of. Defendant's Request No. 16's second sentence is as follows (R.C. p. 23):

> "You will, therefore, find for the defendant even though you find that the inference that was drawn from defendant's questions was untrue and defamatory, if you find that defendant's article was written in good faith, for a justifiable purpose, and *with a belief, founded on reasonable grounds, of its truth*, and unless you find that it was made with actual malice."

The instruction was given by the trial court on *petitioner's request*, and without objection or exception, and consequently no appeal lies from that instruction.

The application of the instruction appears at 5 T. 146, 152, and 156, in the sense proposed by petitioner and *not* as a substitute definition of malice in the form of reckless disregard for the truth. Respondent as plaintiff below asked the same instruction as his Request No. 8. Under such circumstances, where both litigants agree how a matter should be charged, and the trial court adopts the request, the instruction becomes the law of the trial and is binding on the parties on appeal. *Zielinski* v. *Cornwell*, 100 N. H. 34, 39, 118 A. 2d 734.

IV.

The New Hampshire procedure in libel cases of leaving as an issue of fact for the jury, the question whether or not a lawful occasion for a writing existed when the evidence is in conflict is proper under Sullivan and Garrison, and should be approved.

The principal complaint of petitioner throughout this litigation has been that the trial court should have ruled as a matter of law that the writing was privileged, prior to the receipt of evidence, or in any event before the case went to the jury.

Nevertheless, while taking this strong position, petitioner acknowledged that to make out privilege, his own absence of bad faith must be shown (R.C. p. 7, line 7). The position of the parties appear at the outset in colloquy in chambers at 1 T. 17 *et seq*, respondent's position being stated at 20-21.

The question is one of fact whether words, prima facie privileged, were maliciously spoken with intent to defame rather than from proper motives and for a proper purpose. *Moore v. Butler,* 48 N. H. 161, 167-169. Whether an alleged libel is a privileged communication is, under New Hampshire law, a question for the jury, under instructions. *Carpenter* v. *Bailey,* 56 N. H. 283.

Carpenter v. *Bailey* presented the precise point to the New Hampshire Court that the instant petitioner urges. The libel was a petition for the removal of a Navy purchasing agent. Defendant requested that the trial court instruct that such a communication is privileged, but there being evidence of malice in the case, the Court refused, and left the issue to the jury under the same instruction given in this case (Compare 56 N. H. 285 with Charge 5 T. 154). On appeal, the New Hampshire Court said (287, 290):

> "The question as to the publication being privileged was rightly for the jury.
>
> • • •
>
> "Whether the occasion of the publication of this alleged libel was lawful depends upon the good faith and real purpose of the publisher, and therefore must necessarily be settled by the jury. In *Palmer* v. *Concord,* 48 N. H. 217, it was held that a court cannot rule that a communication is privileged, without assuming the conditions on which it is held to be privileged, namely, that it was made in good faith for a justifiable purpose, and with a belief founded on reasonable grounds of its truth."

Palmer v. *Concord*, 48 N. H. 211, sets out this rationale at length at *p.* 217, *reversing* the Trial Court which had ruled that writings critical of the Union Army *were* privileged, and states that such has been the settled law since 9 N. H. The same rule was followed in and approved in *Hutchins* v. *Page*, 75 N. H. 215, 216, 72 A. 689, and again in *Lafferty* v. *Houlihan*, 81 N. H. 67, 121 A. 92, with a full discussion at *pp.* 71-72. *Slocinski* v. *Radwan*, 83 N. H. 501, 144 A. 787, was reversed when the Trial Court ruled that utterances *were* libelous. *Blanchard* v. *Claremont Eagle*, 95 N. H. 375, 63 A. 2d 791 indicates at *p.* 378, that in a "comment" case, it is for the jury to decide whether the comment is "honest opinion expressed for a proper purpose" and whether or not defendant abused a conditionally privileged occasion. This settled law was applied also in *Chagnon* v. *Union Leader Corp.*, 103 N. H. 426, 174 A. 2d 825, a case which involved both false factual defamation and comment.

In footnote 20 of this Court's decision in *Times* v. *Sullivan*, *supra*, 11 L. ed. Adv. 686, at 706, the Court lists several state court decisions as "oft-cited statements of a like rule which has been adopted by a number of state courts"—including New Hampshire by inclusion of citation of the *Chagnon* case, *supra*. Those cases illustrate that the New Hampshire procedure is generally followed in jury cases elsewhere:

Ponder v. *Cobb*, 257 N.C. 281, 126 S.E. 2d 67 (1962) holds that the existence of a lawful occasion is usually for the court but may be a mixed question of law and fact, and that under such circumstances the question of privilege is for the jury. *Lawrence* v. *Fox*, 357 Michigan 134, 97 N.W. 2d 719 (1959) holds similarly that privilege is usually for the Court "unless there are questions relating to the extrinsic circumstances of the occasion requiring the jury's resolution" which were not present in that case but are present here. The Court says, at *p.* 722:

> "Of course, a question may be presented as to whether the extrinsic facts (as distinguished from the words them-

selves) are such as to justify the finding of an occasion of privilege in the first place. * * * But lacking such factual issue as to the occasion, the matter of privilege is for the court."

Stice v. *Beacon Newspaper Corp.*, 185 Kan. 61, 340 P. 2d 296 (1959) states (italics added):

"A privileged publication is one made on an occasion which furnishes a prima facie legal excuse for making it *unless some additional facts are shown* which alter the character of the publication. It comprehends communications made in good faith, without actual malice and with reasonable or probable grounds for believing them to be true."

Bailey v. *Charlestown Mail Assn.*, 126 W. Va. 292, 27 S.E. 2d 837, suggests that good faith requires that "an honest and diligent effort has been made to ascertain the truth of the matter stated. * * * An honest belief [in their truth] presupposed an effort to ascertain the truth, in the absence of which the belief would be groundless". [*Hogan* v. *N. Y. Times*, 313 F. 2d 354 (2 Cir. 1963), accord.]

Salinger v. *Cowles*, 195 Iowa 873, 191 N. W. 167 (1922) holds that criticism "must be legitimate and proper. * * * Those who are vicious and malignant may not conceal attack upon another under a camouflage of qualified privilege."

Snively v. *Record Pub. Co.*, 185 Cal. 565, 198 P. 1 (1921) relies on the principal New Hampshire cases for its adoption of the new rule, and points out that the absence of malice is an essential part of the defense of privilege, which procedurally in that case was cast on defendant. Not so, in this case, the burden of proving malice was placed on respondent (plaintiff below), see 5 T. 162, as in *McLean* v. *Merriman*, 42 S. D. 394, 175 N.W. 878 (1920).

Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P. 2d 150, is the only one of the cases listed in footnote 20 of the

Sullivan decision to take the contrary view, *i.e.*, that the lawful occasion does not depend upon the character of the writing. *Friedell v. Blakely Printing Co.*, 163 Mich. 226, 203 N.W. 974, requires "good faith" as part of privilege but casts the burden of showing improper motive on plaintiff.

We respectfully submit that neither *Sullivan* nor *Garrison* properly should be extended to the point of dictating to the state courts how the issues of lawful occasion, privilege and malice must be handled procedurally as between trial court and jury. The presumptions employed by the Alabama Court emasculated the jury function as finders of the fact in *Sullivan;* trial was by the court in *Garrison.* The instant case involves a jury determination under instructions consistent with the subsequently announced Federal constitutional rules.

We, therefore, respectfully suggest that the petitioner's argument that the "lawful occasion" is a matter which *must* be ruled upon as a matter of law for constitutional reasons is unsound and should be rejected.

CONCLUSION

We prefaced this brief by citing Article 12, 14 and 20 of Part 1 of the Constitution of New Hampshire, and the Seventh and Ninth Amendments to the Constitution of the United States. We believe these provisions indicate that this Court should affirm the decision below.

Those claiming the protection of this Court as persons exercising freedom of speech and press under the First Amendment are not the only persons entitled to constitutional protection. Respondent Baer is constitutionally entitled to his remedy for injury to his character, under Article 14 of our State Constitution. His character or reputation is a part of his person entitled to protection at common law, a settled rule recognized prior to both State and Federal Constitutions, See *Matassa* v. *Bel*, 246 La. 294, 164 So. 2d 332 at 334 (1964); *State* v. *Browne*, 86 N. J. Super 217, 206 A 2d 591 (1965). Being a valuable

right, his reputation cannot be taken from him for public use without compensation, as constitutionally provided in our Article 12. And, he is entitled to the remedy of trial by jury, under our Article 20. The Ninth Amendment to the Constitution of the United States points out that rights enumerated in that Constitution shall not be construed to either deny nor disparage other rights retained by the people—such as Baer's right to a remedy for injury to his reputation—and the Seventh Amendment requires this Court to recognize our jury trial result according to the rules of the common law.

It would seem to us that this Court is without constitutional authority to abridge the constitutional right to recover for injury to character in the exposition of a broader freedom of speech than is constitutionally protected against like abridgment. PEDRICK, FREEDOM OF THE PRESS AND THE LAW OF LIBEL: THE MODERN REVISED TRANSLATION, 49 Cornell L. Q. 581, 588 (Summer 1964). And there are sound reasons for questioning the wisdom of such a course: GOODHART, FREEDOM OF SPEECH AND FREEDOM OF THE PRESS, 1964 Wash. U. L. Q. 248, 250, 251.

New York Times v. *Sullivan*, applied to libel of the official conduct of public officials for the purpose of striking down legal presumptions of bad faith based solely on honest misstatement of fact involves no such encroachment: but if now extended and interpreted as requiring that trial courts *rule as a matter of law* that every writing which contains reference to "matters of public concern" or which is published during a "public debate" is privileged, we are convinced that the result will be increased unjustified defamation with deterioration, rather than improvement, of the public debate or the conduct of public affairs.

This Court, in *Barr* v. *Matteo, supra*, 3 L. ed at 1444, said, in granting immunity for defamation to a public official:

> "And there are of course other sanctions than civil tort suits available to deter the executive official who may

be prone to exercise his functions in an unworthy and irresponsible manner."

There is *no* substitute for libel, however, to deter the writer or publisher who similarly abuses freedom of the press in an unworthy and irresponsible manner, as did the petitioner in this case. (See Pedrick, *op. cit supra.*, 602)

Finally, if it is constitutional error for judges (both State and Federal) to determine as law that writings are libellous, by the same logic it is error for them to determine that writings are privileged as a matter of law, where there are issues of fact raised as to the good faith, malice, or other extrinsic facts upon which privilege is properly predicated. If *Sullivan* is so interpreted we will have made a complete cycle back to the trial of *John Peter Zenger,* 17 Howell's St. Tr. 675 (1735), which evolved the basic American approach to libel which avoids such dangerous precepts and allows the jury to determine the factual issues without interference from the governmental authority. Whether lawful occasion exists, whether a publication is made in good faith for proper purposes, and with or without malice, were jury issues in this case.

The jury verdict should not be disturbed. The decision of the Supreme Court of New Hampshire should be affirmed.

We desire to be heard orally.

Respectfully submitted,

DOHERTY & DYER
144 Pleasant Street
Laconia, N. H.

MCLANE, CARLETON, GRAF, GREENE & BROWN
STANLEY M. BROWN
40 Stark Street
Manchester, N. H.

Attorneys for Respondent